CASE SUMMARY

Complaint against Vocational Training Council for impropriety in conducting a tender[1] exercise.

The Complaint

The complainant, an engineering company, received a set of quotation documents by fax from the Vocational Training Council (“VTC”) on 15 November 2005, inviting the company to bid for the supply of one lot of bakery workshop equipment, comprising four items, to one of the campuses of the Council’s Hong Kong Institute of Vocational Education (“ the Campus”).

2. The documents specified, *inter alia*, that:

(a) the invitation would close on 18 November 2005 at 10 a.m.;

(b) the equipment should be delivered and installed on or before 30 November 2005 for the Campus’s Open Day; and

(c) tenders submitted late and/or failing to meet the delivery schedule would not be considered.

3. The complainant was aggrieved over the short time for responding to the invitation and for delivering the equipment, produced in Europe and ordered upon request. The complainant, therefore, suspected that VTC had some understanding with a specific supplier prior to the tender exercise.

Initial Response from VTC

4. VTC explained that the equipment was intended to be purchased from local stock. Its tender specifications were drawn up by Campus staff having regard to the training needs of the campus, similar equipment at VTC’s other centres, and catalogues from local suppliers.

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[1] Tender is a generic term used, by VTC and in this Report, to describe the Council’s central procurement methods including tender and quotations by telephone, fax or written.

5. The tender closing period for fax quotation had been shortened from five to three working days under proper authority on this occasion, because the equipment was urgently required for the Campus's Open Day and anniversary celebrations, scheduled on 9 and 10 December 2005 (“the events”). The urgency was occasioned by factors beyond the Campus's control (e.g. funding approval for a special project to be part of the events).

6. VTC maintained that the tender exercise had been conducted fairly in accordance with the Council’s procurement rules.

Our Investigation and Findings

Investigation Process

7. We examined the VTC Procurement Manual and relevant files. We interviewed the Principal and an Executive Officer of the Campus (designated “Officer A” and “Officer B” respectively), and a senior officer at VTC headquarters overseeing procurement matters (“Officer C”). We also sought expert advice from the Government Logistics Department (“GLD”) generally without identifying the organization concerned.

Findings from Files

8. Prior to tendering, Campus staff had visited or contacted six suppliers for quotations and product catalogues. They then nomi relevant headquarters office for tender invitation (includin successful bidder, “Company K”). Nine other suppliers, selecte headquarters office from VTC's registered suppliers list, were also invited to tender.

9. Of these 11 suppliers, only Company K made an offer. The response of the others is summarized below:

(a) 4 did not respond;

(b) 3 (including the complainant and the other supplier nominated by the Campus) did not bid because the delivery schedule and tender closing date could not be met;

(c) 2 (including 1 late return) did not bid because the

delivery schedule could not be met; and

(d) 1 made a late bid for one item only.

10. Company K made **two** bids. Its first bid, submitted on 16 November 2005, was stamped and initialled by the Council's "Tender Opening Team" ("TOT") on 18 November 2005. This bid did not include a quotation for item (4), a spiral mixer, and offered to deliver item (3) "approx. 6 – 8 weeks ETA Hong Kong" (i.e. by January 2006).

11. Company K's second bid, received on 18 November 2005 after tender closing, carried the remark "Supplementary Quotation" but no TOT stamp or initials. This had the following changes:

(a) all items were covered, including the spiral mixer, with a delivery date "approx. 6 – 8 weeks ETA Hong Kong"; and

(b) the delivery date for item (3) had become "immediate".

12. The headquarters office referred Company K's bids to the Campus for tender evaluation on 18 November 2005. Officer B confirmed in writing **on the same day** that Company K's second bid had complied with the Campus's tender specifications and recommended acceptance.

13. Company K's offer was approved by Officer C on 19 November 2005. VTC placed a purchase order with Company K on 21 November 2005, stating the delivery date to be "on or before 30 November 2005" and enclosing a copy of Company K's second bid (i.e. including the late delivery of the spiral mixer).

14. Company K issued an order confirmation on 22 November 2005, re-stating the delivery date of the spiral mixer as "on/before week 3, 2006 ETA Hong Kong".

15. Upon request, Officer B produced to this Office a copy of Company K's delivery note (not placed on file) indicating that the equipment was delivered on 1 December 2005 with a spiral mixer (of a different model) on loan to the Campus, pending the delivery of a mixer of the model as specified in the quotation documents.

16. This Office could not ascertain from file records the circumstances under which the supplementary quotation was sought, why Company K's bid was regarded as conforming and how the loan was arranged.

<u>Interview with Campus Staff</u>

17. Officer A contended that the he and his staff had visited Company
during the supplier sourcing stage and identified the bakery eq
display as suitable, except for the spiral mix
oversized. He, therefore, ordered a smaller one when raising the pu
requisition. He denied favouring Company K, insisting that the
might be available in the local market and obtained thr
tendering.

18. Officer B advised that tender evaluation had been con

supplies staff of the Campus (“Officer D”), who had confirmed by telephone with Company K that the spiral mixer could be delivered on time, although the confirmation was not documented. As su supplementary to Company K’s second bid, she considered the company’s offer to conform to relevant requirements and acceptance.

19. After placing the purchase order, Company K told Officer D that spiral mixer was not available for delivery by 30 November 2005 as agr but it could lend a different model of the mixer. The Campus accepted the loan offer without recording it on file.

20. Officer D gave similar responses to those given by Officer A and Officer B.

<u>Interview with Officer C</u>

21. Officer C indicated that:

(a) after tender opening, he had authorized his staff to telephone Company K for a supplementary quotation (i.e. the second bid) for the revised delivery date of item (3) and an additional bid of the spiral mixer, noting that the spiral mixer had been omitted from the tender schedule though its specificatio were provided in Sheet 5 attached to the schedule; and

(b) as the Campus had secured a verbal ag Company K about the timely delivery of the spiral m approval was given to accept the Company’s offer.

22. Acknowledging that there was no provision quotation in the VTC Procurement Manual (para 7) and that he had not been specifically authorised to seek one, Officer C argued that flexibility should be allowed given the urgency of the matter and that only Company K had made a “valid” offer (i.e. the bid was submitted before tender closing). He claimed to be not aware that Company K’s second bid attached to the purchase order had not been revised to reflect the verbal agreement, or that Company K’s order confirmation had indicated late delivery for the spiral mixer. He also did not

know about the loan of a spiral mixer to the Campus.

Our Observations

23. We consider the stringent timing for tender closing and delivery had precluded most invited bidders from bidding. This had created a favourable environment for Company K to be the only supplier to offer, as it was confirmed to have the stock (except for a right-s mixer) during the Campus staff's visit.

24. Company K's initial offer did not conform to the tender specifications in respect of the delivery date of item (3) and did not cover an offer for the spiral mixer. However, the Company was allowed to submit a supplementary quotation without proper authority. This had effectively changed the Company's terms of quotation after tender closing.

25. Even then, Company K's second bid still failed to comply fully with the specified delivery date, in respect of the spir maintained that there was a supplementary verbal agreement with Company K over the timely delivery of the mixer, this was not borne out by any record On the contrary, VTC's purchase order enclosing Company K's second bid and Company K's order confirmation had consistently made reference to the lat delivery of the spiral mixer.

26. Thus, it lends credence to the complainant's suspicion that there had been some prior arrangement between VTC and tender, with the loan as a condition for accepting its late delivery of the spiral mixer.

Our Conclusion

27. We cannot agree that the tender exercise had been conducted fairly (para 6). We consider that Company K had been given an unfair edge over the other bidders in view of the supplementary quotation, and that Officer B's recommendation and Officer C's approval to accept Company K's non-conforming offer in respect of the spiral mixer had been improper.

28. We also consider the Council's tendering system to have been compromised, professedly due to urgency. This could have been avoided by better planning for the events and recourse to "direct purchase authority", as provided in the Procurement Manual, for waiving competitive tendering at times of urgency.

29. The complaint against VTC is, therefore, **substantiated**.

Our Recommendations

30. The Ombudsman made the following recommendations to VTC:

(a) to remind its staff not to breach any procurement rules for the sake of expediency, or they might face disciplinary actions; and

(b) to establish an internal audit system for random checks on tendering and purchases, to ensure propriety and adequate documentation.

Response from VTC

31. VTC (both the Management and the staff concerned) disputed our observations and our conclusion. They maintained that our conclusion should be based on proof beyond doubt and not speculation, especially regarding the suspected prior arrangement. To this end, the three Campus staff members had made a declaration on oath specifically denying any prior arrangement with Company K.

32. VTC considered that it had every right to pursue urgent procurement from local stock. There was no change of substance to Company K's bid after tender opening, with the supplementary quotation sought in line with VTC's established practice and on the ground of "negotiation" provided under the tender schedule. As verbal agreements should also be regarded as a contract, Company K's bid was conforming. While admitting impropriety in the form of clerical errors (omitting the spiral mixer from the tender schedule and failing to update Company K's second bid attached to the purchase order) and inadequate documentation (on the verbal agreement), VTC considered these irrelevant to the fairness of the tender exercise.

33. Specifically, the VTC Management considered the complainant not to have been disadvantaged, because the company did not have local stock and could not deliver the equipment by the specified date.

34. VTC, nonetheless, acknowledged the need to establish clear guidelines on supplementary quotation and direct purchase authority, and to take forward our recommendations.

Advice from Government Logistics Department

35. GLD's advice is summarized below:

(a) It was inappropriate to obtain supplementary quotation from Company K. To address the issue of omitted spiral mixer, VTC[2] should have notified all invited bidders for quotation on the item by a common deadline.

(b) The verbal agreement was sought improperly. As the spiral mixer was included in Company K's original offer, it should have been evaluated according to the specifications and rejected accordingly.

(c) Negotiations should only be conducted if the bidder's offer fully conformed to tender specifications. Proper procedures should be established on record keeping, negotiation process (by correspondence and/or meetings) and negotiation personnel (by officers with no real or potential conflict of interest in the purchase).

36. Overall, GLD considered the tender to have been full of fundamental flaws: for seeking the supplementary quotation, conducting verbal negotiation and accepting a non-conforming offer. GLD could not conclude whe Company K was given an unfair edge, w bidders' reasons for not making an offer equipment/price if VTC would allow an alternativ equipment.

37. An **analysis of VTC's actual tendering processes** viewed in the contexts of its Procurement Manual and GLD's advice is at the **Annex**.

The Ombudsman's Final Remarks

38. We cannot accept that there was no change of substance to Compan K's bid after tender closing. We also consider that the Company h given an unfair edge over the other invited bidders, particularly as so them had indicated that time constraint precluded their making an offer. Our reasons below:

(a) The supplementary quotation had given Company K an opportunity

[2] Referred to only as a Government-funded organization when GLD's advice was sought.

to change the delivery date of item (3) and include the spiral mixer in its bid, such opportunity not being available to the other invited bidders; and

(b) The alleged verbal agreement had allowed Company K to change, for a second time, for the delivery date of the spiral mixer, without which the Company's offer would be non-conforming.

39. We see the substance of this complaint to be unfairness in the tender exercise, hence the complainant's capability, or the lack of it, to meet VTC's tender specifications is irrelevant. As this Office is not a court of law and our investigation not judicial, our findings need not be based on proof beyond reasonable doubt.

40. We consider that a favourable environment had b Company K due to the fact that the Company was confirmed to have the stock prior to tendering. This was not the case for the 10 other invited bidders.

41. The proof of a verbal agreement is important to verify VTC's claim of accepting a conforming offer in respect of the spiral mixer. However, there is no documentation whatsoever on the agreement's reneging on the alleged verbal agreement. On the other hand K's documents (second bid and order confirmation) and actions (actual delivery and the loan) were consistent with its offer of late delivery of the spiral mixer. In this light, it is difficult for one to dismiss the suspici arrangement.

42. The Ombudsman maintains her conclusion th **substantiated** on account of procedural unfairness, and urges VTC to consult GLD in revising its procurement guidelines.

Office of The Ombudsman
December 2006

Annex

An Analysis of VTC Tendering Processes vs VTC Procurement Manual and GLD Advice

Actual Processes	VTC Procurement Manual	GLD Advice
After tender, seek supplementary quotation (SQ) from Company K confirming the delivery date of item (3) and including the spiral mixer which was omitted from the tender schedule of VTC's quotation documents.	No provisions made for SQ.	It is a **fundamental flaw** to have sought the SQ. To address the issue of the omitted spiral mixer, all invited bidders should have been invited to tender the item.
During evaluation of the SQ, Officer A allegedly secured by telephone a verbal agreement (VA) from Company K for the timely delivery of the spiral mixer (its delivery date as stated in the SQ was after VTC's specified deadline).	No provisions made for VA.	It is inappropriate to seek the SQ in the first instance. If Company K had not included the spiral mixer in its **original** bid, it should be evaluated against the specified timeline and rejected accordingly. VTC had accepted a **non-conforming** offer and this is **unfair** to other invited bidders.
SQ and VA were sought in line with VTC's established practice and on the ground of 'tender' [illegible]	The tender provides VTC for [illegible] negotiate with all tenderers about the tender [illegible]	Negotiation should only be conducted on any non-conform[illegible] under proper procedures: record keeping, [illegible]

provided tender schedule.	tender/quotation.	correspondence and/or meeting (never orally by a single officer) and by officers without real or potential interest in the purchase.